

E-Filed on 08/23/07

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

In re:
USA CAPITAL REALTY ADVISORS, LLC,

Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,

Debtor.

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

In re:
USA SECURITIES, LLC,

Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case Nos.:
BK-S-06-10725-LBR
BK-S-06-10726-LBR
BK-S-06-10727-LBR
BK-S-06-10728-LBR
BK-S-06-10729-LBR

JOINTLY ADMINISTERED
Chapter 11 Cases

Judge Linda B. Riegle

**APPLICATION FOR ORDER TO
SHOW CAUSE WHY DR. LUCIUS
BLANCHARD SHOULD NOT BE
HELD IN CONTEMPT OF COURT**

Hearing Date: September 28, 2007
Hearing Time: 1:30 p.m.

1 Pursuant to Federal Rule of Bankruptcy Procedure 9016 and Federal Rule of Civil
2 Procedure 45(e), the USACM Liquidating Trust (the “Trust”) respectfully requests that the Court
3 enter an order to show cause why Dr. Lucius Blanchard (“Blanchard”) should not be held in
4 contempt for his continued non-compliance with the Rule 2004 subpoena served upon Blanchard
5 on July 26, 2007. A true and correct copy of the subpoena is attached hereto as Exhibit “A.” This
6 Application is supported by the following memorandum, attached exhibits, papers and pleadings
7 filed in this bankruptcy case, and such argument as the Court may entertain at the hearing on this
8 Application.
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10 **JURISDICTION AND VENUE**

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- 12 1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
13 Venue is appropriate under 28 U.S.C. §§ 1408 and 1409.
- 14 2. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

15 **BACKGROUND**

- 16 3. On April 13, 2006 (the “Petition Date”), USACM, USA Capital Realty Advisors,
17 LLC, USA Capital Diversified Trust Deed Fund, LLC, USA Capital First Trust Deed Fund, LLC,
18 and USA Securities, LLC (collectively, the “Debtors”) filed voluntary petitions for relief under
19 Chapter 11 of the Bankruptcy Code. The Debtors’ Third Amended Joint Chapter 11 Plan of
20 Reorganization became effective on March 12, 2007 (the “Effective Date”), and the Trust
21 succeeded to certain claims and causes of action held by USACM.

- 22 4. In connection with its investigation of such claims and causes of action, the Trust
23 has pursued discovery from various parties under Federal Rule of Bankruptcy Procedure 2004.
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1 5. On July 19, 2007, the Trust filed a Motion for Order Requiring Dr. Lucius
2 Blanchard to Appear for Examination Pursuant to Federal Rule of Bankruptcy Procedure 2004
3 (the “2004 Motion”).¹

4 6. On July 23, 2007, the Court entered an Order Requiring Dr. Lucius Blanchard to
5 Appear for Examination Pursuant to Federal Rule of Bankruptcy Procedure 2004 (the “2004
6 Order”).²

7 7. On July 26, 2007, the Trust served the following upon Blanchard: (a) Subpoena
8 for Rule 2004 Examination³ (the “Subpoena”); (b) the 2004 Motion; (c) the 2004 Order; and (d) a
9 \$43.00 witness fee check. On August 9, 2007, the Trust filed the requisite notice of this service
10 with the Court.⁴

11 8. The Subpoena required Blanchard to appear for examination on August 13, 2007.
12 However, on August 3, 2007, Blanchard’s counsel — Barney Ales of Goold Patterson Ales &
13 Day — contacted the Trust’s counsel to request a postponement of Blanchard’s examination to
14 mid September 2007. Blanchard’s counsel subsequently requested that the examination be further
15 postponed to September 25, 2007. Each time, the Trust’s counsel agreed to accommodate
16 Blanchard’s scheduling requests for the Rule 2004 examination.

17 9. Despite the Trust’s cooperative approach in this regard, Blanchard has virtually
18 ignored his obligation to produce any documents responsive to the Subpoena. The Subpoena
19 required Blanchard to produce responsive documents to the Trust on or before August 3, 2007.
20 Blanchard, however, failed to produce any documents or assert any objections to the Subpoena.
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24 ¹ See Docket No. 4187.

25 ² See Docket No. 4197.

26 ³ A true and correct copy of the Subpoena is attached hereto as Exhibit “A-1.”

⁴ See Docket No. 4466.

1 10. On August 8, 2007, the Trust's counsel made a written request to Blanchard's
2 counsel that Blanchard produce the responsive documents no later than August 13, 2007.⁵ Once
3 again, Blanchard failed to produce any documents or assert any objections to the Subpoena.

4 11. On August 15, 2007, the Trust's counsel made another written request to
5 Blanchard's counsel that responsive documents be produced no later than August 20, 2007.⁶ Yet
6 again, Blanchard failed to produce any documents or assert any objections to the Subpoena.

7 12. In addition to written requests, the Trust's counsel made several attempts to discuss
8 this matter with Blanchard's counsel in an effort to obtain responsive documents. Initially,
9 Blanchard's counsel waffled on whether Blanchard possesses any responsive documents. His
10 counsel, however, later acknowledged that Blanchard probably has some responsive documents,
11 but then admitted that counsel still had not reviewed the Subpoena as of August 21, 2007.

12 POINTS AND AUTHORITIES

13 **A. BLANCHARD SHOULD BE ORDERED TO SHOW CAUSE WHY HE SHOULD** 14 **NOT BE HELD IN CONTEMPT OF COURT.**

15 13. Blanchard has failed to comply with the Subpoena and, therefore, may be held in
16 contempt of court under Federal Rule of Civil Procedure 45, which governs subpoenas for Rule
17 2004 examinations.⁷ Pursuant to Rule 45, "a subpoena *duces tecum* is itself a court order."
18 *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 n.5 (9th Cir. 1983). As such, the
19 failure to comply with a subpoena "may be deemed a contempt of the court from which the
20 subpoena issued." FED. R. CIV. P. 45(e).

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22 ⁵ See Letter from Eric D. Madden to Barney Ales dated Aug. 8, 2007. A true and correct copy of
23 this letter is attached hereto as Exhibit "A-2."

24 ⁶ See Letter from Eric D. Madden to Barney Ales dated Aug. 15, 2007. A true and correct copy of
25 this letter is attached hereto as Exhibit "A-3."

26 ⁷ Subpoenas served pursuant to Rule 2004 are handled in the manner provided by Federal Rule of
Bankruptcy Procedure 9016. See FED. R. BANKR. P. 2004(c). Rule 9016, in turn, states that
Federal Rule of Civil Procedure 45 applies in cases under the Bankruptcy Code. See FED. R.
BANKR. P. 9016.

1 14. As stated above, Blanchard has yet to produce a single document to the Trust or to
2 state unequivocally that he possesses no responsive documents. Nor has he asserted any
3 objections (whether oral or written) to the Subpoena or taken any other action which would justify
4 his non-compliance with the Subpoena. Accordingly, the Court can and should order Blanchard
5 to show cause why he should not be held in civil contempt for his non-compliance with the
6 Subpoena.

7 15. Alternatively, the Court can and should set a date certain for Blanchard to comply
8 with the Subpoena with an admonition that failure to comply with the Court's order will be
9 punished as a criminal contempt of court.

10 **B. BLANCHARD HAS WAIVED ANY OBJECTIONS TO THE SUBPOENA.**

11 16. By failing to timely file written objections to Subpoena, Blanchard has waived any
12 objections to the Subpoena. "[A] nonparty's failure to timely make objections to a Rule 45
13 subpoena *duces tecum* generally requires the court to find that any objections have been waived."
14 *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636 (C.D. Cal. 2005); *see also Deal v. Lutheran Hosp.*
15 *& Homes*, 127 F.R.D. 166, 168 (D. Alaska 1989) (finding that objections to a subpoena were
16 waived by failure to object within the time frame set forth in Rule 45).

17 17. Under Rule 45(c)(2)(B), Blanchard was permitted to assert written objections to
18 the Subpoena only "within 14 days after service of the subpoena or before the time specified for
19 compliance if such time is less than 14 days after service." FED. R. CIV. P. 45(c)(2)(B).

20 18. Blanchard, of course, failed to serve any objections to the Subpoena — whether
21 before or after the 14-day period provided under Rule 45(c)(2)(B). Thus, Blanchard has waived
22 any and all objections to the Subpoena.
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C. BLANCHARD SHOULD BE REQUIRED TO PAY THE TRUST’S REASONABLE EXPENSES RELATED TO THIS APPLICATION.

19. The Trust has incurred expenses in preparing and filing this Application.⁸ “A subpoena *duces tecum* is itself a court order, and non-compliance may warrant sanctions,” including an award of the fees and expenses necessary to enforce the subpoena. *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 n.5 (9th Cir. 1983); *see also Fidelity Nat’l Fin., Inc. v. Friedman*, No. CIV 03-1222 PHX RCB, 2007 WL 446134, at *4 (D. Ariz. Feb. 7, 2007) (awarding attorney fees after granting a motion to compel production because “[a] subpoena *duces tecum* is itself a court order, noncompliance with which may warrant contempt sanctions”). The Trust is entitled to an award of its reasonable expenses, including attorney fees, incurred in seeking the relief requested in this Application. To date, the Trust has incurred approximately \$1,500 in such expenses.⁹

CONCLUSION

For all of the foregoing reasons, the Trust respectfully requests that this Court: (a) enter an order to show cause why Blanchard should not be held in contempt; (b) rule that Blanchard has waived any and all objections to the Subpoena; (c) order Blanchard to pay \$1,500 for reasonable expenses incurred by the Trust in filing this Application; and (d) grant such other and further relief to which the Trust may be entitled.

⁸ See Declaration of Eric D. Madden in Support of Application for Order to Show Cause Why Dr. Lucius Blanchard Should Not Be Held in Contempt of Court ¶¶ 10-11. A true and correct copy of the affidavit is attached hereto as Exhibit “A.”

⁹ See *id.* ¶ 10.

1 DATED: August 23, 2007

2 **DIAMOND MCCARTHY LLP**

3
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CERTIFICATE OF CONFERENCE

As more specifically set forth in the separate declaration filed with this motion, I certify that counsel for the Trust and counsel for Blanchard have personally conducted a conference at which there was a substantive discussion of every item presented to the Court in this motion and despite best efforts the counsel have not been able to resolve those matters presented.

Certified to the 23rd day of August, 2007 by the undersigned.

Eric D. Madden
Eric D. Madden